PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED
MAR 1 1972
CLERK

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. ---------- 71-1009

HERBERT LOYD LINDAUER,
Petitioner,

VERSUS

The OKLAHOMA CITY URBAN RENEWAL AUTHORITY, a Public Body Corporate, and its Board of Commissioners composed of W. M. HARRISON, F. D. MOON, R. A. HUNTER, JIM LOOKABAUGH and HARVEY EVEREST,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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February, 1972

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY. PH. 235-0030

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, above-named, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding.

OPINIONS BELOW

The Tenth Circuit Court's opinion is set forth in full in the Appendix attached hereto and marked "Appendix "A."

The Order denying Petition for Rehearing was entered on January 10, 1972.

The Judgment of the United States District Court for the Western District of the State of Oklahoma is reprinted and attached as Appendix "B."

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

The pertinent question presented is whether the statutes of Oklahoma, being Title 11, Oklahoma Statutes Annotated, Articles 1601-20, 1651-70, and 1701-18, are constitutional and whether the District Court for the Western District of Oklahoma committed error in failing to convene a Three-Judge Court as provided by 28 U.S.C. §§ 2281 and 2284.

The Petitioner had sought to enjoin the enforcement of the Oklahoma statute above-quoted on the ground that the provisions of such statute denied equal rights or franchise to certain Oklahoma citizens, including Appellant thereby perpetrating an invidious violation of the equal protection clause of the Fourteenth Amendment.

STATEMENT OF THE CASE

The Petitioner-Appellant, Herbert Loyd Lindauer, filed an action in the United States District Court for the Western District of Oklahoma, seeking to have declared unconstitutional the Urban Renewal Act, which is found in Title 11, Oklahoma Statutes Annotated, Articles 1601-20, 1651-70, and 1701-18.

This was presented on the ground and upon the theory that this Act of the Oklahoma Legislature deprived the petitioner of equal protection of the law under the Fourteenth Amendment in that Oklahoma City is a city of more

than 100,000 population and under this Act, the City Council passed upon the question of Urban Renewal, while in a city of 100,000 or less population, under this Act, the people had the right to vote and determine whether or not they would come under and adopt the Urban Renewal as provided in the statute.

Therefore, the petitioner in this case presents to the Court the question of whether or not a state can discriminate against a citizen and take away his right to vote on an important question and grant to a citizen in a smaller populated city of 100,000 or less, the right to vote.

ARGUMENT AND AUTHORITIES

We think that the Court should consider that the petitioner, Herbert Loyd Lindauer, is being deprived of his property because the Urban Renewal Authority is attempting to take it for public use under Oklahoma Statutory authority to act through its City Council without a vote of the people. There are only two counties in Oklahoma with a population in excess of 100,000, they being Oklahoma County, in which Oklahoma City is located, and Tulsa County, in which Tulsa is located. All the citizens in other parts of the State of Oklahoma, residing in cities, have the right to, and of course do, exercise their rights to vote on the question of Urban Renewal.

Petitioner believes that the right to vote is sacred and that there should be no discrimination on account of the city in which one lives.

Without citing the cases, this Court has numerous times held that the right to vote has been abused and citizens have been denied that right on account of race. These

cases all hold that this is a denial of a constitutional right. We deem it unnecessary to call to the Court's attention a large number of cases and we think that to call this Court's attention to the case of *Charles W. Baker, et al., Appellants v. Joe C. Carr, et al.*, decided March 26, 1962, found in 82 Sup.Ct. 691, 369 U.S. 186, answers all the questions that argument could answer in this case and it involves the right to vote, which is denied to citizens under the Urban Renewal Act above-quoted.

We copy for the benefit of the Court, only certain paragraphs of the syllabus in this case, as follows:

"9. *Courts* 299 (3)

"Federal district court had jurisdiction of subject matter of complaint by certain Tennessee citizens alleging that a state statute effected an apportionment that deprived them of equal protection of the laws in violation of the Fourteenth Amendment, under the judicial-power article of the Federal Constitution, and under statute providing district courts shall have original jurisdiction of any civil action to redress deprivation of any right secured by the Federal Constitution. U.S.C.A. Const. art. 3, § 2; Amend. 14; 28 U.S.C.A. § 1343; Acts Tenn. 1901, c. 122.

"12. *Constitutional Law* 42

"Residents of certain counties in the state, allegedly qualified to vote for members of the General Assembly representing counties in which they resided, suing on their own behalf and on behalf of all qualified voters of their respective counties and in behalf of all voters of the state similarly situated, had standing to maintain a suit in federal court for a declaration that a state statute effected an apportionment that deprived plaintiffs of equal protection. U.S.C.A. Const. Amend. 14; Acts Tenn. 1901 c. 122.

"13. *Constitutional Law* 211.

"A citizen's right to vote free of arbitrary impairment by state action is a right secured by the Federal Constitution if such impairment results from dilution by a false tally, or by a refusal to count votes from arbitrarily selected precincts, or by a stuffing of the ballot box, U.S.C.A. Const. Amend. 14.

"16. *Constitutional Law* 68 (3)

"Claim of certain state voters that they were being denied equal protection was justiciable, and if discrimination was sufficiently shown, right to relief under the equal-protection clause was not diminished by fact that the discrimination related to political rights. U.S.C.A. Const. Amend. 14."

The present election laws of the State of Oklahoma are found in Title 26, Oklahoma Statutes Annotated, and in the Cumulative pocket parts for use in 1970-1971, Section 93.2 of said pocket parts as follows:

"The word 'elections' as used in this Act is here declared to mean every general, primary, runoff primary, regular or special election held in this State, or in any county, city, town, township or precinct for the nomination or election of Federal, State, district, county, municipal or township officers or upon any issue submitted to the people of the State or any municipality or subdivision of the State."

The Supreme Court of the State of Oklahoma in the case of *Hines* v. *Winters*, 320 P.2d, beginning on page 1114, said that the qualification of electors was fixed by unambiguous provisions of the Constitution and statutory law and the common law affords no aid in proper interpretation of the Constitution and statutes relating to electors.

The Constitution of the State of Oklahoma fixes the right to vote in Oklahoma, being Article I, Federal Relations, page 593, as follows:

"Section 1. *Supreme law of land*

"The State of Oklahoma is an inseparable part of the Federal Union, and the Constitution of the United States is the supreme law of the land."

Article II, of the Constitution of the State of Oklahoma, Bill of Rights, page 616, is as follows:

"Section 4. *Interference with right of suffrage*

"No power, civil or military, shall ever interfere to prevent the free exercise of the right of suffrage by those entitled to such right."

"Section 7. *Due process of law*

"No person shall be deprived of life, liberty, or property, without due process of law."

Article III, of the Constitution of the State of Oklahoma, Suffrage, in General, page 946, is as follows:

"Section 1. *Qualifications of electors—Persons disqualified*

"Qualified electors of this State shall be citizens of the United States, citizens of the State, including persons of Indian descent, (native of the United States), who are over the age of twenty-one years and who have resided in the State one year, in the county six months, and in the election precinct thirty days next preceding the election at which such elector offers to vote."

Amendment 14, page 984, of the Constitution of the United States is as follows:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Amendment 15, page 986, of the Constitution of the United States is as follows:

"Section 1: The right of the citizens of the United States shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

Amendment 19, of the Constitution of the United States, page 988, is as follows:

"The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

"Congress shall have power to enforce this article by appropriate legislation."

CONCLUSION

The Petitioner therefore feels that there is no legal, just or equitable right or reason why he should be denied the right to vote upon the question of whether Urban Renewal shall be adopted in Oklahoma City, merely because Oklahoma City is a city of more than 100,000 population.

The granting of this right to vote to a citizen in a city of 100,000 population or less certainly constitutes a discrimination and denies to this Petitioner his constitutional rights under the Constitution of the State of Oklahoma and the Constitution of the United States.

Petitioner, therefore, most respectfully petitions this Court to grant a Writ of Certiorari in this cause and to reverse, vacate and set aside the opinion of the United States Court of Appeals, Tenth Circuit, and direct and order the Judgment of the United States District Court for the Western District of Oklahoma to be vacated and a judgment entered, decreeing and declaring the Urban Renewal Act unconstitutional and void.

Respectfully submitted,

JOHN B. OGDEN
Suite 1412
City National Bank Tower
Oklahoma City, Oklahoma 73102
Counsel for Petitioner,
Herbert Loyd Lindauer

February, 1972

CERTIFICATE OF MAILING

I, JOHN B. OGDEN, Counsel for Petitioner, do hereby certify that I have this _____ day of February, 1972, duly served a copy of the foregoing copy of the Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit on the following Counsel for Respondents:

Messrs. James D. Batchelor,
Jerry L. Salyer, and
John W. Swinford, Jr., Esquires
15 N. Robinson, Suite 506
Oklahoma City, Oklahoma 73102

by mailing a true and correct copy thereof to said Counsel for Respondents, on this the _____ day of February, 1972.

JOHN B. OGDEN,
Counsel for Petitioner,
Herbert Loyd Lindauer.

APPENDIX "A"

FILED
United States Court of Appeals
Tenth Circuit
Dec. 2, 1971
HOWARD K. PHILLIPS
Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

NOVEMBER, 1971, TERM

HERBERT LOYD LINDAUER, Plaintiff, Appellant,	)	
v.	)	No. 71-1045
THE OKLAHOMA CITY UBAN RENEWAL AUTHORITY, a Public Body Corporate, and its Board of Commissioners composed of W. M. HARRISON, F. D. MOON, R. A. HUNTER, JIM LOOKABAUGH, and HARVEY EVEREST, Defendants, Appellees.	)	

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA
(District Court No. 70-244)

Ted R. Fisher, Tulsa, Oklahoma, for Appellant.

James D. Batchelor and Jerry L. Salyer (Barry W. Johnson, John W. Swinford, Jr. and Harry H. Selph II, on the brief), Oklahoma City, Oklahoma, for Appellees.

Before LEWIS, HAMLEY* and HILL, United States Circuit Judges.

HILL, Circuit Judge.

* Of the Ninth Circuit, sitting by designation.

[APPENDIX]

This is an appeal from the order of the United States District Court for the Western District of Oklahoma denying the application of the appellant to convene a three-judge court, as provided by 28 U.S.C. §§ 2281 and 2284, for failure to show a substantial federal constitutional question, and dismissing the action for failure to state a claim upon which relief might be granted. Appellant had sought to enjoin enforcement of Oklahoma statutes pertaining to urban renewal,[1] alleging that the provisions of such statutes denied equal rights of franchise to certain Oklahoma citizens, including appellant, thereby perpetrating an invidious discrimination violative of the equal protection clause of the Fourteenth Amendment. The statutes in question created an urban renewal authority for cities having a population in excess of 100,000 (Oklahoma City and Tulsa being the only such cities), while no such authority could be created for cities and towns with a population of 100,000 or under without approval by the voters of the given municipality. The district court found the statutes in question to be constitutional.

Appellant argues that there is a proper basis for invoking the jurisdiction of a three-judge court; the complaint presents a substantial federal constitutional question; and the district court to which the application is addressed cannot pass on the merits of the complaint. Appellees contend that there is no basis for convening a three-judge court, as no substantial federal constitutional question is raised. The issue thus presented is whether a substantial federal constitutional question is presented by appellant's complaint.

It is well established that many statutory classifications may be created which do not violate equal protection. Only invidious discrimination offends the United States Constitution. Ferguson v. Skrupa, 372 U.S. 726 (1963). If a rational relationship between the classification and the attainment of a valid public purpose exists, the enactment will be sustained. Williamson v. Lee Optical of Okla., Inc.,

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[1] 11 O.S.A. §§ 1601-20, 1651-70, 1701-18.

348 U.S. 483 (1955); Ohio ex rel. Clarke v. Deckebach, 274 U.S. 392 (1927). Application of a law to a locality of a particular population classification is not invalid unless the classification is purely arbitrary, oppressive or capricious. Packard v. Banton, 264 U.S. 140 (1924); Hayes v. Missouri, 120 U.S. 68 (1887). The allegation that the Oklahoma Urban Redevelopment Law violates the equal protection clause of the Fourteenth Amendment poses no substantial federal question. It is clear that blight and deterioration exist in heavily populated areas. The Oklahoma legislature's decision to use its police power to attack the problems of the larger cities first does not lack rational justification. Consequently, there is no real issue as to the constitutionality of the population classification.[2] It is worthy of note that an attack on the same statutes in the courts of Oklahoma, wherein violations of the Oklahoma constitution and the Fourteenth Amendment of the United States Constitution were alleged, was rejected by the Oklahoma Supreme Court. Isaacs v. Oklahoma City, 437 P.2d 229 (1966), *cert. denied* 389 U.S. 825.

The question of the constitutionality of a statute must be substantial before there is a right to a three-judge panel. Bailey v. Patterson, 369 U.S. 31 (1962). The district judge to whom the application for a three-judge court is addressed may dismiss a complaint which fails to raise a substantial federal question.[3] As no substantial federal question is presented, the district court properly dismissed the complaint.[4]

Affirmed.

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[2] *See* Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483 (1955); State ex rel. Fatzer v. Urban Renewal Agency of Kansas City, 296 P.2d 656 (1956).

[3] White v. Gates, 253 F.2d 868 (D.C. Cir. 1958), *cert. denied* 356 U.S. 973.

[4] Taggart v. City of Grand Prairie, 421 F.2d 1301 (5th Cir. 1970); Castle v. Haines, 226 F.2d 591 (7th Cir. 1955), *cert. denied* 350 U.S. 1014; Landsberger v. Freeman, 217 F.Supp. 138 (D.D.C. 1963); Voege v. Am. Sumatra Tobacco Corp., 192 F.Supp. 689 (D.Del. 1961); Bunce v. Williams, 159 F.Supp. 325 (E.D. Mich. 1958).

APPENDIX "B"

FILED
Dec. 11, 1970
REX D. HAWKS
Clerk, U. S. District Court
By VERA EDDLEMAN
Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

HERBERT LOYD LINDAUER, Plaintiff,	)	
vs.	)	No. 70-244 Civil
THE OKLAHOMA CITY URBAN RENEWAL AUTHORITY, a Public Body Corporate, and its Board of Commissioners composed of W. M. HARRISON, F. D. MOON, R. A. HUNTER, JIM LOOKABAUGH, and HARVEY EVEREST, Defendants.	)	

MEMORANDUM OPINION

In this case, Plaintiff claims that Title 11, Oklahoma Statutes, Sections 1601 to 1620 inclusive (the Oklahoma Urban Development Law for cities of over 100,000 population) are unconstitutional and that their enforcement against him in taking certain properties situated in Oklahoma City, Oklahoma and belonging to him denies him the equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution. In this connection, it is Plaintiff's contention that the above laws do not afford the citizens of Oklahoma City, Oklahoma the right to vote on the exercise of the authority or powers of the Urban Renewal Authority (the exercise of said authority or powers is left to the local governing body of Okla-

homa City) whereas, both Title 11, Oklahoma Statutes, Sections 1651 to 1670 inclusive (the Oklahoma Urban Development Act for cities of 10,000 to 100,000) and Title 11, Oklahoma Statutes, Sections 1701 to 1718 inclusive (the Oklahoma Urban Development Act of 1961 for cities of 10,000 or less) provide that before the exercise of the authority or powers of the Urban Renewal Authority, the approval thereof shall be by resolution of the local governing board of the city involved *and* a majority vote of the qualified property tax paying voters of the city at an election held for that purpose. Thus, Plaintiff complains that he has no vote as a citizen of Oklahoma City (which has a population of over 100,000) but that citizens of other cities in Oklahoma with a population below 100,000 have a vote as to whether the authority and powers of the Urban Renewal Authority shall be exercised.

Plaintiff applied to the Court for the creation of a three-judge court under the provisions of 28 U.S.C. 2281 et seq. The Court denied the application by an Order filed herein on May 20, 1970, which by reference is made a part of this Memorandum Opinion. Plaintiff's appeal of this Order has been dismissed for lack of jurisdiction by the United States Court of Appeals for the Tenth Circuit under date of November 24, 1970. At the pretrial conference conducted herein on September 4, 1970, the parties stipulated and agreed that the case on its merits was submitted to the Court without the introduction of evidence and on briefs to be submitted. The briefs have been filed herein and have been considered by the Court. The Court has awaited the decision of the Court of Appeals on the three-judge ruling before proceeding to the merits of the case.

Plaintiff's attack on the Urban Renewal legislation of the State of Oklahoma as being unconstitutional is not supported by the cases. The United States Supreme Court in *Berman* v. *Parker,* 348 U.S. 26, 99 L.Ed 27, 75 S.Ct. 98 (1954), upheld the validity and constitutionality of Urban Renewal legislation. Plaintiff's specific complaint that the

[APPENDIX]

Oklahoma legislation is unconstitutional in that it denies him the equal protection of the laws because he and other citizens of the City of Oklahoma City do not have the right to vote on the exercise of Urban Renewal Authority in their community, whereas citizens of smaller cities are permitted to vote on such exercise in their community, has also been the subject of court adjudication unfavorable to the Plaintiff. *City of Kansas City* v. *Robb*, 332 P.2d 520 (Kans. 1958); *Isaacs* v. *Oklahoma City*, 437 P.2d 229 (Okl. 1967), at p. 236, cert. denied 389 U.S. 825, 19 L.Ed.2d 79, 88 S.Ct. 63 (1967). Also see *Kramer* v. *Union Free School District*, Note 7, 395 U.S. 621, 23 L.Ed.2d 583, 89 S.Ct. 1886 (1969). The Court finds and concludes that the classification made by the Oklahoma legislature between the larger and smaller cities is a natural and genuine one, having a substantial and reasonable relation to the subject matter involved. It is common knowledge that populous cities are subject to more slum and blighted areas which are injurious to the health and welfare of their inhabitants, whereas, differences of opinion may exist in smaller cities as to whether slum and blighted areas are present. Thus, population is a legitimate ground for classification and differentiation with respect to holding elections regarding the exercise of Urban Renewal power and authority. The Court finds that the classification is not arbitrary but is genuine and reasonable.

Plaintiff's action should, therefore, be dismissed as it fails to state a claim upon which relief may be granted. Counsel for Defendants will prepare an appropriate judgment of dismissal for the signature of the Court and entry herein.

Dated this 11th day of December, 1970.

s/ Fred Daugherty
Fred Daugherty
United States District Judge

Supreme Court, U.S.
FILED
MAR 6 1972
E. ROBERT SEAVER, CLERK

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JAMES B. WHITE
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March, 1972

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. 235-0030

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT

Petitioner seeks to obtain review of a decision of the United States Court of Appeals for the Tenth Circuit sustaining the judgment of the United States District Court for the Western District of Oklahoma.

This action was instituted on May 8, 1970, by complaint asserting the Oklahoma Urban Redevelopment Law, 11 Okla. Stat. §§1601-1620, to be unconstitutional and seeking the appointment of a three-judge court. The District Court denied the application for a three-judge court and dismissed the action for failure to state a claim upon which relief might be granted. See Memorandum Opinion (W.D. Okla., Civil No. 70-244), Appendix B, Brief of

Petitioner. The Court of Appeals affirmed this decision on the ground that no substantial federal question was presented. See Opinion (10th Cir., No. 71-1045), Appendix A, Brief of Petitioner.

The provisions of the Urban Redevelopment Law apply to all incorporated cities in Oklahoma in excess of 100,000 population. 11 Okla. Stat. §1602. The powers conferred by this legislation may be invoked by resolution of the local governing body. 11 Okla. Stat. §1607.

Subsequently, other acts were passed by the Oklahoma Legislature applying to cities having populations between 10,000 and 100,000, and cities with population of no more than 10,000, which acts were identical to the Urban Redevelopment Law except that an additional requirement for invoking powers under the later acts was provided, which reads as follows:

> "No incorporated city shall exercise the authority granted by this Act until a majority of the qualified property taxpaying voters thereof who vote at an election to be held for that purpose shall have approved the same." 11 Okla. Stat. §1657 and 11 Okla. Stat. §1707.

The first enactment, the Urban Redevelopment Law, codified as 11 Okla. Stat. §§1601-1620, was adopted as an emergency measure and became effective on April 7, 1959 (Oklahoma Session Laws, 1959, Chapter 38, pp. 61-77).

Next, the Legislature enacted the Urban Redevelopment Act, codified as 11 Okla. Stat. §§1651-1670 (Oklahoma Session Laws, 1959, Chapter 36, pp. 43-60), applicable to cities between 10,000 and 100,000 population. This Act was

not enacted as an emergency measure and did not become effective until October 1, 1959.

The third urban renewal law, applicable to cities of 10,000 population or less, was passed some two years later and is known as the Urban Redevelopment Act of 1961. This legislation is codified as 11 Okla. Stat. §§1701-1718.

Only the Urban Redevelopment Law, applicable to cities in excess of 100,000 population and the first of the three schemes of legislation, is challenged in this action. The subsequent legislation permitting redevelopment programs in smaller cities is not in issue.

SUMMARY OF ARGUMENT

Petitioner asserts entitlement to a review by a three-judge court on the ground that the complaint alleges a substantial federal question. But where the petitioner's allegations are patently without merit, there is no issue warranting review by a three-judge court and the complaint should be dismissed. The allegation, that the Urban Redevelopment Law, which applies to cities in excess of 100,000 population, violates the "equal protection" clause of the Fourteenth Amendment, poses no substantial federal question.

The Urban Redevelopment Law was the first of three complete and separate statutory schemes to be enacted by the State Legislature. The legislative objective of urban renewal is a sound public purpose. *Berman* v. *Parker*, 348 U.S. 26. The legitimacy of the legislative purpose apparently is not now questioned by petitioner. The petitioner does contend that this law is unconstitutional in that it does

not give him a right to vote on its implementation; whereas, subsequent acts pertaining to smaller communities require voter approval.

This case involves only two issues. First, is the population classification adopted by the Legislature to deal with problems of urban blight reasonable and valid. Second, are all persons within this classification treated fairly and without unlawful discrimination.

That the Legislature chose first to address itself to the problems of the larger cities (those of more than 100,000 population) does not pose an issue for resolution by this Court. It is clear that blight and deterioration exist in the larger cities, while it may or may not be present in smaller municipalities. Thus, neither the Legislature's determination to use the police power to attack the problems of the larger cities *first* nor its decision regarding implementation (which was entrusted to the governing bodies of the cities) lacks rational justification. Consequently, there is no real issue as to the constitutionality of the population classification.

It is further readily apparent from examination of the Urban Redevelopment Law that it applies equally to all persons coming within the classification. There is no requirement for a popular vote to implement the law, but all citizens have an equal voice, although indirect, in that they select the local governing body which makes the decision regarding implementation of this legislation.

Contrary to petitioner's assertion, no question is here presented of denial of the *right* of franchise. It is a legislative prerogative to determine the means and extent of

implementing the police power to deal with problems affecting the public welfare. There is no inherent *right* to vote on such legislative determinations. The Urban Redevelopment Law treats all persons falling within its purview equally and fairly. It does not disenfranchise anyone.

Subsequent passage of the acts permitting small communities to exercise redevelopment powers upon affirmative majority vote of qualified voters does not affect the validity of the earlier Urban Redevelopment Law. The reasonableness of the population classification is not disturbed since these later acts are separate and complete schemes of legislation, intended to treat the possible presence of blight in the smaller towns. The validity of the two later acts is not, and cannot be, challenged by the petitioner in this case.

The foregoing conclusions have been confirmed in three court decisions that foreclose any serious inquiry into the constitutionality of this legislation. State court decisions, squarely in point and persuasive in their reasoning, have unequivocally rejected the contention of unlawful discrimination where it is predicated on the fact that such legislation does not extend the right to vote to citizens in large cities. *Isaacs* v. *Oklahoma City*, 437 P.2d 229 (Okla. 1966), *cert. den.* 389 U.S. 825 (involving the identical legislation and the exact challenge presented in this case); *City of Kansas City* v. *Robb*, 183 Kan. 834, 332 P.2d 520 (1958). This Court has also spoken with favor about a similar legislative scheme. *Kramer* v. *Union Free School District*, Note 7, 395 U.S. 621.

It follows that no real Fourteenth Amendment question is presented for determination, and that there is no issue warranting review by this Court.

REASONS FOR DENYING THE WRIT

I

PETITIONER'S CHALLENGE OF THE URBAN REDEVELOPMENT LAW OF OKLAHOMA, WHICH IS APPLICABLE ONLY TO CITIES OF 100,000 POPULATION, PRESENTS NO SUBSTANTIAL "EQUAL PROTECTION" ISSUE.

The sole challenge in this case is directed to the validity of the Urban Redevelopment Law of Oklahoma, which applies to cities in excess of 100,000 population. Petitioner seeks, by Writ of Certiorari, to obtain review by this Court of issues which have been previously well-considered and are long-settled. A review of the pertinent cases demonstrates that a significant issue of "equal protection" asserted by the petitioner is not present, and there is, therefore, no reason for granting the Writ.

A. There is no basis to convene a three-judge court where a substantial federal question is not presented.

Where the allegations of the complaint are found to be patently without merit, the petitioner has no right to a three-judge panel. *Bailey* v. *Patterson*, 369 U.S. 31; *Phillips* v. *United States*, 312 U.S. 246.

This Court is not limited to the question of proper allegations in the Petition, but may consider authority outside the bill as to whether a substantial federal question has been raised:

> ". . . The question may be plainly unsubstantial, either because it is 'obviously without merit' or because 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the sub-

ject and leave no room for the inference that the question sought to be raised can be the subject of controversy.' Levering & G. Co. v. Morrin, supra (289 U.S. 103); Hannis Distilling Co. v. Baltimore, 216 U.S. 285; McGilvra v. Ross, 215 U.S. 70." *Ex Parte Poresky*, 290 U.S. 30.

The rules concerning the right to a three-judge court are clearly established and well-known to this Court. The essential consideration in this case is whether the facts presented, as distinguished from the petitioner's personal conclusions, set forth a substantial federal question.

B. The population classification established by the Urban Redevelopment Law is reasonable and is a proper exercise of legislative discretion.

It is now beyond serious dispute that urban renewal or community redevelopment is a valid public purpose, and is, therefore, a proper legislative objective within the purview of the police power of the state. *Berman* v. *Parker*, 348 U.S. 26. In the *Berman* case, the Court applied the general rule that when the legislature has spoken, subject to specific constitutional limitations, public interest has been declared in terms well-nigh conclusive.

Here the purpose of Oklahoma's Urban Redevelopment Law is not dissimilar from that of the urban redevelopment legislation under attack in the *Berman* case. The aim of both is to eliminate slums and blight from urban areas, and prevent further re-occurrence of these conditions. It is incontestable that the effects of these conditions place a heavy burden on the public welfare; therefore, it is clear that the object of this legislation constitutes

a valid public purpose and, as such, is within the scope of the state's police power.

Once the public purpose has been established, the means of executing the project are for the legislature, and it alone, to determine. *Luxton* v. *North River Bridge Co.*, 153 U.S. 525; *Highland* v. *Russell Car & Snow Plow Co.*, 279 U.S. 253. There is no reasonable doubt that the determination of the legislature to classify urban renewal programs on the basis of population is proper. The law in this area is well-settled and free from substantial dispute. It is only legislative classification based on "invidious discrimination" that offends the equal protection guarantee of the Constitution. *Ferguson* v. *Skrupa*, 372 U.S. 726. Where there is any conceivable, rational relationship between the legislative classification and attainment of a proper public purpose, the enactment will be sustained. *Dandridge* v. *Williams*, 397 U.S. 471; *McGowan* v. *Maryland*, 366 U.S. 420; *Ohio ex rel. Clarke* v. *Deckebach*, 274 U.S. 392. In such cases, the burden of showing that the classification adopted by the legislature is unconstitutional rests upon the petitioner. *Morey* v. *Doud*, 354 U.S. 457; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61. Further, this Court has long adhered to the rule that the application of a law to a locality by population classification is not invalid unless the classification is purely arbitrary, oppressive, or capricious. *Hayes* v. *Missouri*, 120 U.S. 68; *Mason* v. *Missouri ex rel. McCaffery*, 179 U.S. 328; *Radice* v. *New York*, 264 U.S. 292.

At the time of its adoption, the Urban Redevelopment Law, applying to cities of over 100,000 population, was the *only* state legislation relating to urban redevelopment. Thus, the primary question presented in this dispute is

whether there was a reasonable basis to support the legislative determination to restrict the application of urban redevelopment to cities exceeding 100,000 population.

It is common knowledge that problems of slums and blight exist in heavily populated metropolitan areas; whereas, such problems may or may not be present in smaller communities. It is equally clear that it is the prerogative and responsibility of the legislature to determine the manner and extent of eliminating social evils through reform measures. In *Williamson* v. *Lee Optical of Okla.*, 348 U.S. 483, 489, the Court stated:

> ". . . The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Tigner v. State of Texas, 310 U.S. 141. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. Semler v. Oregon State Dental Examiners, 294 U.S. 608. The legislature may select one phase of one field and apply a remedy there, neglecting the others. A.F. of L. v. American Sash & Door Co., 335 U.S. 538 . . .".

See to the same effect *Katzenbach* v. *Morgan*, 384 U.S. 641. The Oklahoma Legislature chose to first address itself to those areas of the state most acutely in need of urban redevelopment. It is submitted that this was a reasonable exercise of legislative discretion.

The petitioner has failed to cite a single instance in which the judiciary has rejected a legislative population classification in implementing a program designed to elimi-

nate slums or substandard housing. In fact, such population classifications in furtherance of legislative schemes in urban redevelopment have been universally sustained by the courts. See, *e.g.*, *State ex rel. Fatzer* v. *Urban Renewal Agency of Kansas City*, 179 Kan. 435, 296 P.2d 656 (1956); *Foeller* v. *Housing Authority of Portland*, 198 Ore. 205, 256 P.2d 752 (1953); *Krause* v. *Peoria Housing Authority*, 370 Ill. 356, 19 N.E.2d 193 (1939); *State ex rel. Porterie* v. *Housing Authority of New Orleans*, 190 La. 710, 182 So. 725 (1938).

In sustaining an urban renewal act applying only to cities having a population of more than 75,000, the Kansas Supreme Court in *State ex rel. Fatzer* v. *Urban Renewal Agency of Kansas City, supra*, stated:

> "It is a matter of common knowledge that as cities become more populous they are more subject to slum and blighted areas which are injurious to the public health, safety, morals and welfare of the residents, and in our opinion the population of a city furnished a legitimate ground for a classification and differentiation such as that contained in the act under consideration . . .". 296 P.2d at 659.

And in *Foeller* v. *Housing Authority of Portland, supra*, the court sustained an urban redevelopment law which was restricted to municipalities located in counties having a population of 70,000 or more. Therein, the court said:

> "Difference in the size of cities may call for difference in legislative treatment. Classification of cities upon the basis of their population is not improper if their difference in size has a reasonable bearing upon their needs and the conditions to which a legislator should give heed. (Citations omitted)."

Thus, the determination of the Oklahoma legislature to apply urban redevelopment initially only to cities in excess of 100,000 people represents a reasonable exercise of legislative discretion and *does not* present an "equal protection" issue.

C. All persons within the population classification established by the Urban Redevelopment Law are treated equally and without discrimination.

It is readily apparent from perusal of the Urban Redevelopment Law that all persons are treated equally. There is no requirement for a popular vote, and the decision as to whether to implement the law is made by the local governing body of the city. 11 Okla. Stat. §1607. Thus all persons in such cities have an equal voice, although indirect, through their local governing body in the determination to implement this legislation. This is consistent with the "equal protection" guaranty of the Fourteenth Amendment. Indeed, this precise issue has heretofore been resolved by the Oklahoma Court. *Isaacs* v. *Oklahoma City*, 437 P.2d 229 (Okla. 1966), *cert. den.* 389 U.S. 825.

Contrary to petitioner's assertion, there is no attempt by the Legislature to "take away his right to vote on an important question . . .". (Brief of Petitioner, page 3). There simply is no fundamental *right* of citizens, including petitioner, to vote when the legislature adopts a program designed to deal with questions affecting public welfare. This principle is basic to our representative form of government. See *Minor* v. *Happersett*, 88 U.S. (21 Wall.) 162. Indeed, one of the primary responsibilities of the legislature is to determine the manner and extent of exercising the police power to meet such problems.

It is submitted that this is a fundamental and essential rule. In carrying out governmental responsibilities, legislators have traditionally dealt with cities based upon their size and must do so if state and municipal government is to function in an orderly manner. It has never been a requirement that residents of cities be given the right to vote as a prerequisite to implementation of proper legislative programs. See *Waite* v. *Santa Cruz*, 184 U.S. 302; *Lowden* v. *Oklahoma County Excise Board*, 186 Okla. 706, 100 P.2d 448 (1940); *Frazer* v. *Carr*, 360 S.W.2d 449 (Tenn. 1962). As discussed above, the size of cities provides the most logical and natural basis (classification) that the Legislature could have adopted to deal with problems of slum and blight. Certainly the decision of the Legislature to implement this program, without a popular vote, through the governing body of the city (City Council) is a proper choice of legislative means and is not discriminatory to the petitioner.

Petitioner has mistakenly relied upon *Baker* v. *Carr*, 369 U.S. 186, and other cases (not cited) which hold that the *right* to vote may not be unlawfully denied or diluted. The complaint in the *Carr* case alleged that the Apportionment Act of Tennessee effected a gross disproportion of legislative representation to voting population. That case involved the election of representatives to the legislature and was a true voting rights case. As seen above, in the instant case, there is no *right* to vote on the means or manner chosen by the legislature to implement the police power. *A fortiori*, the *Carr* case and similar cases are inapposite.

The petitioner has completely overlooked the fact that the City Council of Oklahoma City, which decides whether to implement urban redevelopment, is properly elected by all residents of the city, and that the petitioner has an equal voice with all other city residents in that election.

The Urban Redevelopment Law does not disenfranchise anyone, but treats all persons encompassed by the classification properly and without discrimination.

II

LEGISLATIVE APPROVAL OF SUBSEQUENT ACTS PERMITTING REDEVELOPMENT PROGRAMS IN SMALLER CITIES ONLY UPON MAJORITY VOTE OF QUALIFIED VOTERS DOES NOT AFFECT THE VALIDITY OF THE EARLIER LAW.

The petitioner asserts that the Urban Redevelopment Law must be considered collectively with subsequent acts extending urban redevelopment to cities of smaller population. See 11 Okla. Stat. §§1651-1670; 11 Okla. Stat. §§ 1701-1718. This subsequent legislation was identical to the Urban Redevelopment Law except that a favorable vote of the qualified voters of the smaller cities was required prior to its implementation. Since the Legislature recognized that the need to eliminate slums or congested housing may not be imperative in smaller municipalities, it included the vote provision as a logical additional requirement for invoking redevelopment powers. Consequently, the fact that smaller communities are required to vote on the necessity for invoking urban renewal powers does not make the Urban Redevelopment Law unreasonable or arbitrary.

The petitioner apparently acknowledges that the Urban Redevelopment Law was valid when passed, but concludes that it somehow became discriminatory to him when the subsequent Urban Redevelopment Acts for smaller cities were adopted. The subsequent acts in no way involve the rights of the petitioner, and neither enhanced nor restricted his voting privilege. It is submitted that the earlier legislation, limited to larger cities and complying with Constitutional guarantees when adopted, cannot become invalid by virtue of later legislation providing a different method for implementation in smaller communities.

The validity of the subsequent legislation is, of course, not an issue in this case and the petitioner, being a resident of Oklahoma City, has no standing to challenge the later enactments which pertain to smaller communities. *Doremus* v. *Board of Education*, 342 U.S. 429; *Tileston* v. *Ullman*, 318 U.S. 44; *McCabe* v. *Atchison T. & S. F. R. Co.*, 235 U.S. 151.

Petitioner's real complaint is that he disagrees with urban redevelopment and does not wish to see it implemented. He has a right to this belief, as do others, but it does not make the Urban Redevelopment Law unconstitutional and it does not give the petitioner an automatic right to vote on this question. His proper remedy would be to attempt to persuade the state legislators to repeal the law or the local governing body (City Council) to rescind its decision to implement the legislation. The petitioner may not like the decision of the City Council, but in a representative form of government, he must abide by it until the decision is changed through proper legislative processes.

We may assume, for the purposes of argument only, as does the petitioner, that the three Oklahoma Statutes pertaining to urban redevelopment were adopted at the same time and form a single legislative scheme. There have been three cases which have considered the precise issue raised by the petitioner, and in each case the legislation has been sustained.

City of Kansas City v. *Robb*, 183 Kan. 834, 332 P.2d 520 (1958), involved the resolution of an issue substantially identical to that presented herein. An act authorizing the issuance of general obligation bonds in support of urban renewal programs was challenged as being unconstitutional. The basis of the challenge was that an election was required prior to issuance of the bonds in cities with less than 125,000 population, but such a bond election was unnecessary, except upon a protest petition, in cities exceeding 125,000 population (two cities in Kansas were in this category: Wichita and Kansas City). In sustaining the act, the court stated:

> ". . . Certainly, the expense and delay of holding bond elections in larger cities and the greater need and urgency for urban renewal action justifies a classification on the basis of population, which, in this case, has a real and substantial relation to the purpose of the statute. It is conceivable that differences of opinion may exist in small cities as to whether slums and blighted areas are present, thus making population a legitimate ground for classification and differentiation with respect to holding elections to issue bonds to undertake and carry out urban renewal projects . . .". 332 P.2d at 523.

The petitioner has ignored the fact that the problem of slum clearance and rehabilitation is of peculiar magni-

tude in larger cities. There is a real and substantial justification for the voting distinction for the cities over and under 100,000 population. The Legislature is aware of the existence of slums in cities over 100,000 and there is no logical basis for an expensive, time-consuming election whereas in smaller cities there may be a reasonable basis for disagreement upon the need for redevelopment and the elections are not as expensive and cumbersome.

The case of *Kramer* v. *Union Free School District*, 395 U.S. 621, is somewhat complex. However, a clear understanding of this case shows that it squarely supports the position of the respondents. The case involved a New York law which provided three methods of school board selection. In large city districts, the school board is appointed by the mayor or city council; in some cities, primarily those with less than 125,000 residents, the school board is elected at a general election of all qualified city voters; and, in other districts, such as the one involved in the *Kramer* case, which are primarily rural and suburban, the school board is elected at an annual meeting which precluded certain qualified electors from participating.

The holding of this Court was that where the legislature has extended the right to vote to certain members of the school district, it is unlawful discrimination to exclude other interested qualified voters from the election. The Court made it very clear there was no requirement that the legislature extend the right to vote for school board members, but if this privilege was extended to a particular district (or classification), it must be extended fairly and without discrimination to all resident voters in that district. In fact, the Court cited with favor the pro-

vision of the New York law which allows the mayor or city council to appoint school board members in cities with population generally in excess of 125,000 persons. In comparing this provision of the New York legislation with the provision which extended the right to vote on a selective basis to persons in smaller school districts, the Court stated:

> "Of course, the effectiveness of any citizen's voice in governmental affairs can be determined only in relationship to the power of other citizens' votes. For example, if school board members are appointed by the mayor, the district residents may effect a change in the board's membership or policies through their votes for the mayor. Cf. NY Educ Law §2553, subd. 2, 4 (1953), as amended (Supp 1968). Each resident's formal influence is perhaps indirect, but it is equal to that of other residents. However, when the school board positions are filled by election and some otherwise qualified city electors are precluded from voting, the excluded residents, when compared to the franchised residents, no longer have an effective voice in school affairs . . .". Footnote 7, 395 U.S. at 627.

The *Kramer* case strongly supports the position that the legislature may classify problems on a population basis and may either extend or withhold the voting privilege within those population classifications. If, however, the legislature does extend the right to vote to some persons within a particular population classification, it may not arbitrarily exclude others. The Court was also careful to point out that there is no necessity for exacting judicial examination to find a compelling state interest in legislation where all persons within the classification are on equal footing.

In the instant case, as we have seen, all persons are treated equally within the population classification established by the Urban Redevelopment Law. This situation meets the *Kramer* test that all citizens within the classification have the same equal, although indirect, voice.

Finally, the exact legislation and the identical contentions which are now before the Court have recently been considered and rejected by the Oklahoma Supreme Court. *Isaacs* v. *Oklahoma City, supra*. It was contended in that case that "to deprive the citizens of a city with a population of 100,000 of the right to vote on such an issue is unreasonable and arbitrary and violates the equal protection of the law guaranteed by the Fourteenth Amendment of the U. S. Constitution . . .". The Oklahoma Court rejected this assertion; sustained the population classification, and held the Urban Redevelopment Law to be valid and constitutional. The *Isaacs* case is squarely in point and is compelling precedent in that this Court denied the Petition for Writ of Certiorari in that case. 389 U.S. 825.

In the instant case, the United States Court of Appeals, Tenth Circuit, stated in its opinion:

> ". . . The allegation that the Oklahoma Urban Redevelopment Law violates the equal protection clause of the Fourteenth Amendment poses no substantial federal question. It is clear that blight and deterioration exist in heavily populated areas. The Oklahoma Legislature's decision to use its police power to attack the problems of the larger cities first does not lack rational justification. Consequently, there is no real issue as to the constitutionality of the population classification . . .". Opinion (10th Cir., No. 71-1045), Appendix A, p. iii, Brief of Petitioner.

The petitioner has failed to cite a single case in which population classification or lack of direct voter participation has overturned a legislative program of urban redevelopment. The Oklahoma Urban Redevelopment Law, either viewed alone or considered collectively with other legislation enacted on the subject of urban redevelopment, presents no Fourteenth Amendment issue for determination.

CONCLUSION

The strong rational basis for the Oklahoma Legislature's decision to attack *first* the problems of blight in the larger cities and to entrust the implementation of redevelopment powers to the governing bodies of those cities, precludes any serious question of the validity of the Urban Redevelopment Law.

Respondents pray that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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March, 1972

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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-1009

HERBERT LOYD LINDAUER,
Petitioner,

VERSUS

The OKLAHOMA CITY URBAN RENEWAL AUTHORITY, a Public Body Corporate, and its Board of Commissioners composed of W. M. HARRISON, F. D. MOON, R. A. HUNTER, JIM LOOKABAUGH and HARVEY EVEREST,
Respondents.

PETITION FOR REHEARING

JOHN B. OGDEN
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Counsel for Petitioner, Herbert Loyd Lindauer

April, 1972

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. 235-0030

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APPENDIX "A"

Opinion of the Supreme Court of Oklahoma in Landauer v. The Oklahoma City Urban Renewal Authority, No. 44957 (Oklahoma Bar Journal), on March 14, 1972, affirming the Judgment of the District Court of Oklahoma County

TABLE OF AUTHORITIES

CASES:

320 F. Supp., 332 (1970)
452 F. 2d. 117 (1971)

STATUTES:

Urban Redevelopment Law, 11 O.S.A. 1971 §§ 1601-1620
11 O.S.A. 1602, 1607, 1652 & 1657

CONSTITUTIONAL PROVISIONS:

Equal Protection Clause—Fourteenth Amendment to the U. S. Constitution

In the

Supreme Court of the United States

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Respondents.

PETITION FOR REHEARING

COMES NOW the above-named Petitioner and shows to this Honorable Court that this Court denied the Petition for Writ of Certiorari on the 27th day of March, 1972, and your Petitioner feels that this Court should vacate such order denying Certiorari herein and for the following reasons and grounds and shows to the Court the following:

1. That on the 14th day of March, 1972, the Supreme Court of the State of Oklahoma rendered its Opinion in the case of *Lindauer, et al.* v. *The Oklahoma City Urban Renewal Authority*. It affirmed the District Court of Oklahoma County, Oklahoma, in denying relief to the Petitioner and held that the Urban Renewal Authority Act referred to in these proceedings was constitutional and did not violate the equal protection clause of the Fourteenth Amend-

In the
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COMES NOW the above-named Petitioner and shows to this Honorable Court that this Court denied the Petition for Writ of Certiorari on the 27th day of March, 1972, and your Petitioner feels that this Court should vacate such order denying Certiorari herein and for the following reasons and grounds and shows to the Court the following:

1. That on the 14th day of March, 1972, the Supreme Court of the State of Oklahoma rendered its Opinion in the case of *Lindauer, et al.* v. *The Oklahoma City Urban Renewal Authority*. It affirmed the District Court of Oklahoma County, Oklahoma, in denying relief to the Petitioner and held that the Urban Renewal Authority Act referred to in these proceedings was constitutional and did not violate the equal protection clause of the Fourteenth Amend-

ment to the United States Constitution. Copy of said Opinion is attached to this Petition for Rehearing as Appendix "A" for the benefit of this Court.

2. Your Petitioner shows that a Petition for Rehearing has been filed in the Supreme Court of Oklahoma in said cause and said cause is presently pending upon said Petition for Rehearing before the Supreme Court of the State of Oklahoma.

3. Your Petitioner now shows that since the Supreme Court of Oklahoma has affirmed the District Court of Oklahoma County, that he is now without any relief unless this Court will vacate its order denying Certiorari and grant Certiorari in this cause.

4. Your Petitioner shows that he has challenged the Authority's right to condemn his property on the grounds that the Urban Redevelopment Law, 11 O.S.A. 1971 §§ 1601-1620, violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution in that it arbitrarily provides for discrimination in the rights of franchises between citizens of the State of Oklahoma.

> "The Oklahoma statutory provsion, 11 O.S.A. 1602, 1607, 1652 and 1657, on creation of Urban Renewal Authorities, in effect at the time the Oklahoma City Urban Renewal Authority was created on June 27, 1961, by Resolution, provided for rights of franchise for some classes of Oklahoma citizens and excluded rights of franchise for other classes of Oklahoma citizes, determined by numerical population classification only, constituted invidious and arbitrary discrimination in the right to franchise violative of the equal rights and equal protection of the law provisions of the Fourteenth Amendment to the United States Constitution."

This case was originally tried in the United States District Court for the Western District of Oklahoma. See 320 F. Supp. 332 (1970), and said cause was appealed to the Tenth Circuit. See 452 F.2d 117 (1971).

Petitioner feels that the Courts failed to recognize the significance of the laws in effect on June 27, 1961, when the Oklahoma City Urban Renewal Authority was created by Resolution. One Act then applied to cities over 100,000 population (§§ 1602-1607). The other Act then in effect applied to cities under 100,000 population and extended the right of franchise, withheld from the other Act. The validity of the pertinent statutes must be determined as of the date of their application involved which was June 27, 1961. At that time there was no reasonable or rational basis for differing treatment as regards the rights of franchise, all other pertinent portions of the two enactments being identical. Only the population classification provided any basis whatsoever for differing treatment in rights of franchise on June 27, 1961.

So long as the first statutory enactment stood by itself, the fact that it applied urban redevelopment provisions to cities only over 100,000 population, there was no factor of discrimination as to rights of franchise involved; but, the subsequent enactment of the identical provisions of the statute applicable to cities under 100,000 population with the added provision for rights of franchise, thereby presented for the first time the question of discrimination in rights of franchise based solely on arbitrary population classification. The significance thereof was overlooked by the courts in the Opinions above-mentioned. The prohibited

arbitrary and invidious discrimination violative of the Equal Rights and Equal Protection of the Law provisions of the Fourteenth Amendment to the United States Constitution, includes the exclusion of a part of a state's citizens from franchise rights by *numerical population classification*, as the sole articulated basis for including some and "fencing out" others equally qualified and having equal substantial interests and being equally affected thereby, when such exclusions, at the time of their creation, are unnecessary to promote a compelling state interest.

CONCLUSION

Petitioner, therefore, shows to this Court that a valuable constitutional right has been denied to him and that this Court should assume jurisdiction and reverse said cause.

Respectfully submitted,

JOHN B. OGDEN
Suite 1415
City National Bank Tower
Oklahoma City, Oklahoma 73102
Counsel for Petitioner, Herbert Loyd Lindauer

April, 1972

CERTIFICATE OF GOOD FAITH

I, the undersigned counsel, hereby certify that the above and foregoing Petition for Rehearing is presented in good faith and not for delay, but in order that substantial justice may be done.

Counsel also certifies that the Petition for Rehearing herein is presented for the further reason that the grounds of this Petition for Rehearing were not, in the opinion of counsel, fully and clearly presented and some of the authorities presented in this Petition for Rehearing were not presented in the original Petition for Writ of Certiorari.

JOHN B. OGDEN
Counsel for Petitioner

CERTIFICATE OF MAILING

I hereby certify that I served copies of the above and foregoing Petition for Rehearing on:

Messrs. James D. Batchelor,
Jerry L. Salyer, and
John W. Swinford, Jr., Esquires
15 N. Robinson, Suite 506
Oklahoma City, Oklahoma 73102

this ..... day of April, 1972.

JOHN B. OGDEN
Counsel for Peitioner

APPENDIX "A"

LINDAUER et al. v. THE OKLAHOMA CITY URBAN RENEWAL AUTHORITY
No. 44957. March 14, 1972.
(For Official Publication)

Appeal from District Court, Oklahoma County; Harold C. Theus, Trial Judge.

In a condemnation proceeding commenced by the Oklahoma City Urban Renewal Authority, defendants challenged the Authority's right to condemn their property on the ground that the Urban Redevelopment Law, 11 O.S. 1971, §§1601-20, violates the equal protection clause of the fourteenth amendment to the United States Constitution. The trial court held the Act constitutional and defendants appeal. Affirmed.

Johnson & Fisher, By: Ted R. Fisher, Tulsa, for plaintiffs in error.

James D. Batchelor, Jerry L. Salyer, Barry W. Johnson, John W. Swinford, Jr., Harry H. Selph, II, Oklahoma City, for defendant in error.

McINERNEY, J. The Oklahoma City Urban Renewal Authority, plaintiff, commenced a condemnation proceeding to acquire fee simple title to property owned by defendant Lindauer and occupied by defendant Grace Cleaners, Inc., his tenant. Claiming that the Authority was created under an unconstitutional legislative enactment, defendants challenged the Authority's right to condemn their property. The trial court ruled against defendants and they appeal.

In 1959, the Legislature adopted the Urban Redevelopment Law, 11 O.S. 1971, §§1601-20. This Law applies only to cities having a population of more than 100,000, 11 O.S. 1971, §1602, and thus includes Oklahoma City. Under Section 1607, a city elects to exercise authority granted in the

Act by a resolution of its governing body. At the same session, the Legislature enacted a similar urban renewal law, The Urban Redevelopment Act, 11 O.S. 1971, §§1651-70, which applies to cities with a population exceeding 10,000, but not exceeding 100,000. 11 O.S. 1971, §1652. However, in addition to a resolution of a city's governing body, a city's exercise of authority under this Act must be approved by a majority of its qualified property taxpaying voters who vote at an election held to determine that question. 11 O.S. 1971, §1657. Later, the Legislature again adopted another similar urban renewal law for cities of 10,000 or less population, The Urban Redevelopment Act of 1961, 11 O.S. 1971, §§1701-18. This 1961 Act also required approval of a city's governing body and its electorate before the city could exercise the authority granted by the Act. 11 O.S. 1971, §1707.

Defendants contend that the Urban Redevelopment Law, 11 O.S. 1971, §§1601-20, violates the equal protection clause of the fourteenth amendment to the United States Constitution. To support this contention, defendants argue that qualified property taxpaying voters in cities of more than 100,000 are denied equal treatment under the law because they are not allowed to vote on whether their cities should exercise urban renewal authority, whereas similarly qualified voters in all other cities are permitted to vote on this issue. Further, defendants assert that the three urban renewal Acts create two distinct classes of property taxpaying voters, that the only basis for this classification is population, and that the classification is arbitrary and not necessary to promote a compelling state interest.

The validity of urban renewal legislation was upheld against constitutional challenges in Berman v. Parker, 348 U. S. 26 (1954). Likewise, this Court declared the Urban Redevelopment Law, 11 O.S. 1971, §§1601-20, to be constitutional and valid in Isaacs v. Oklahoma City, Okl., 437 P.2d 229 (1966). In *Isaacs*, the Court specifically held that the Act was not a special or local law prohibited by the Okla-

homa Constitution, 437 P.2d at 236. Similarly, in Kansas City v. Robb, 183 Kan. 834, 332 P.2d 520 (1958), the Supreme Court of Kansas held that the urban renewal Act was not special legislation in violation of the Kansas Constitution, although this legislation required a vote to issue general obligation urban renewal bonds in cities of 125,000 or less population, but required no vote in cities exceeding 125,000 population, except upon a protest petition. Furthermore, in Lindauer v. Oklahoma City Urban Renewal Authority, W.D. Okl., 320 F. Supp. 332 (1970), affirmed 452 F.2d 117 (10th Cir. 1971), the Court rejected a constitutional attack on the Urban Redevelopment Law, 11 O.S. 1971, §§1601-20, which was based on the same grounds as the present constitutional challenge to the validity of this Act. Moreover, plaintiff Lindauer in that case is the same person as defendant Lindauer in the case now before this Court. In that case, Judge Daugherty ruled that the classification created by our urban renewal Acts was reasonable and thus did not violate the equal protection clause of the fourteenth amendment. We agree with the reasoning of Judge Daugherty in Lindauer, supra.

In *Robb*, the Court justified the classification by pointing out that larger cities contain more slum and blighted areas than smaller cities; that, therefore, the need for urban renewal in larger cities is greater and more pressing; and that, under these circumstances, population is a legitimate ground for classification in an urban renewal law. 332 P.2d at 523. We approve of the rationale used by the Supreme Court of Kansas to justify a classification based on population. Consequently, we hold that the different methods provided by the Legislature for implementation of our urban renewal legislation have a rational basis and thus are not arbitrary or unreasonable. *See* McDonald v. Board of Election Comm'rs, 394 U.S. 802, 809 (1969); Berman v. Parker, 348 U.S. 26, 33 (1964).

The Urban Redevelopment Law, 11 O.S. 1971, §§1601-20, does not result in unequal treatment of voters in cities

having a population of more than 100,000. None of them have the opportunity to directly participate in their cities' decisions to exercise urban renewal authority. Yet, all of them can indirectly participate in these decisions at elections held to select members of the governing bodies of their cities; each of them exerts equal influence over the decision making process provided by the Act. See Kramer v. Union Free School Dist. No. 15, 395 U. S. 621, 627 n.7 (1969).

Since all the voters in cities of more than 100,000 population receive equal treatment under the Urban Redevelopment Law, 11 O.S. 1971, §§1601-20, the Act does not create a constitutionally impermissible classification such as the classifications involved in City of Phoenix v. Kolodziejski, 399 U. S. 204 (1970) (only real property taxpayers allowed to vote on general obligation bonds); Cipriano v. City of Houma, 395 U. S. 701 (1969) (only property taxpayers allowed to vote on revenue bonds); Kramer v. Union Free School District No. 15, 395 U. S. 621 (1969) (only owners or lessees of real property, or parents or custodians of children allowed to vote in school district elections); Carrington v. Rash, 380 U. S. 89 (1965) (members of armed services not allowed to vote). Moreover, in our opinion, allowing voters in some separate and distinct municipal corporations to vote directly on matters affecting them does not result in a denial of the franchise to voters in other municipal corporations merely because they vote only indirectly on similar matters. Unless a classification deprives some group or groups of the right to vote, the classification need not be justified by a compelling state interest. Kramer, supra at 626-27; McDonald v. Board of Election Comm'rs, 394 U. S. 802, 806-08 (1968). Thus, since we have determined that the distinctions created by our urban renewal legislation are reasonable rather than arbitrary, this legislation does not violate the equal protection clause of the fourteenth amendment. Lindauer v. Oklahoma City Urban Renewal Authority, 10th Cir., 452 F.2d 117 (1971); Packard v. Ban-

ton, 264 U. S. 140, 143-144 (1924); Hayes v. Missouri, 120 U. S. 68, 71-72 (1887); McDonald v. Board of Election Comm'rs, supra.

Accordingly, the judgment of the district court is affirmed, and the case is remanded for a determination of the amount of compensation to be paid defendants for their property.

BERRY, C.J., and DAVIDSON, V.C.J., and WILLIAMS, JACKSON, IRWIN, LAVENDER, and BARNES, JJ., concur.